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## A VENDOR'S RIGHT TO SPECIFIC PERFORMANCE.

In previous papers<sup>1</sup> I have treated of lack of mutuality as a defence to a bill for the specific performance of a contract. There is one instance, however, in which the "principle of mutuality" is called into requisition to enable a court of equity to grant the plaintiff's prayer for a decree directing the defendant to perform his contractual obligations. I refer to a bill brought by a vendor to force the vendee to pay the purchase money. The relief granted in such cases is the subject of the present paper.

Perhaps the two earliest cases in which a vendor's right to a bill in equity is discussed are *Armiger v. Clark*<sup>2</sup> and *Lewis v. Lord Lechmere*.<sup>3</sup> In the former case the Chief Baron denied the jurisdiction on the ground that there

<sup>1</sup> The earlier papers on Specific Performance and the defence of Lack of Mutuality are found in the May, July, August, September and October numbers of this magazine for 1901.

<sup>2</sup> Bunb, III, 1722.

<sup>3</sup> 10 Mod. 503, 1722. The bill was granted without discussion of the point that the plaintiff only wanted money in *Hatton v. Gray*, 2 Ch. Cas. 164, 1684.

was a remedy at law,<sup>4</sup> in the later the opposite conclusion was reached by Lord Chancellor Macclesfield. He said ". . . that the remedy the vendor had at law upon the articles was not adequate to that of a bill in equity for a specific performance."<sup>5</sup> The counsel for the plaintiff in the last-mentioned case gave, not only the reason adopted by the Chancellor, but also argued "that upon mutual articles there ought to be mutual remedies; that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too."<sup>6</sup>

It will be noticed that these two reasons, the inadequacy of the remedy at law, and the necessity for mutuality, have no relation to each other. One or the other or both are given as the foundation of the vendor's right in almost every case where the matter is discussed. They are both repeated in the next reported English case, *Kenney v. Wexham*.<sup>7</sup> In other English cases only the second reason, the necessity for mutuality, is given.<sup>8</sup>

Little need be said about the validity of the second reason, that of mutuality. It may be asked: "If a court of equity enforces the obligations of one party to a contract, is that any reason why it should concern itself with the obligations of the other party, provided for these last there is an adequate remedy at law?" It is probably impossible to demonstrate the conclusiveness of either a positive or negative answer to this question. The court of equity came into being

<sup>4</sup> If a man comes for a specific performance as to the land itself, a court of equity ought to carry it into execution, because there is no remedy at law; but if it is to have a performance in payment of the money, they may have remedy for that at law." See page 112. The case was also dismissed on other grounds.

<sup>5</sup> Page 506.

<sup>6</sup> Page 506.

<sup>7</sup> 6 Mad. 355, 1822.

<sup>8</sup> *Withy v. Cotthe*, 1 Sim. & Stew. 174, 1822; *Adderley v. Dixon*, 1 Sim. & Stew. 607, 1823, p. 612, both opinions being by Sir John Leach. See also *Walker v. Eastern Counties R. R.*, 6 Hare 594, 1848, p. 602.

The English cases during the last fifty years have granted specific performance to the vendor as a matter of course, no reason being assigned. See, for example, *Morgan v. Holford*, 1 Sma. & Giff. 101, 1852; *Cogent v. Gibson*, 33 Beav. 557, 1864; *Thomas Plate Glass Co. v. Land & Sea Co.*, L. R. 11 Eq. Cas. 248, 1870.

as a result of the accumulation of instances where the common law gave an inadequate remedy or no remedy at all. Some will be impressed with the importance of confining the jurisdiction to the defects of the common law. Others will be impressed with the thought that there is nothing more than fair play, if one party to a contract may seek the protection of the court, in permitting the other to do the same thing. Our conclusion as to which principle should prevail in the particular case under discussion will be largely a question of temperament.

The statement that the remedy at law is inadequate is another matter. It will depend a good deal on the extent of the remedy at common law. Where A. agrees to sell to B. land for a sum certain, to give A. the right to specific performance gives him merely a sum of money. If this identical sum may be recovered at law, the remedy at law would seem to be adequate, unless there is some defect in procedure. On the other hand, if all that can be recovered at law is the difference between the contract price and the market price, then there is at least more ground for saying that the remedy at law is inadequate. I call attention to this difference in the weight of the reason which grants specific performance to the vendor on the ground of the inadequacy of the legal remedy, because the extent of the remedy at law has been, and seems yet in some jurisdictions to be a matter of doubt.

In England, in the case of *Lewis v. Lord Lechmere* just mentioned, the counsel for the plaintiff argued that all his client could obtain at law was the difference between the market and contract price.<sup>9</sup> In giving as a reason for allowing the bill the inadequacy of the legal remedy Lord Maclesfield seems to have acquiesced in this view. On the other hand, in *Armiger v. Clark*, the court appears to have thought that the purchase money could be recovered at law.<sup>10</sup> In the last part of the eighteenth and first part of the nineteenth century there is a apparently a general acquiescence in this last idea. Thus, in *Glazebrook v. Woodrow*,<sup>11</sup> all the judges assumed that had the plaintiff vendor in that case averred

<sup>9</sup> 10 Mod. p. 506.

<sup>10</sup> See *supra*, note 4.

<sup>11</sup> 8 T. R. 366, 1799.

that he had tendered a proper conveyance of the land he could have recovered the purchase money, and in *Hawkins v. Kemp*,<sup>12</sup> Lord Ellenborough, on the purchaser's refusal to take, permitted the recovery by the vendor of full purchase price.<sup>13</sup> In none of the cases mentioned did the defendant question the plaintiff's right, having properly averred and proved that he had offered a good title, to recover the price stipulated in the contract. But in the case of *Laid v. Pim*,<sup>14</sup> the vendor's right to recover the purchase price at law being questioned, Baron Parke said that the plaintiff could only have damages, for the plaintiff could not have his money and his land too.<sup>15</sup> The question does not seem to have come again before the English courts,<sup>16</sup> though the fact that in *Morgan v. Metropolitan R. R. Co.*,<sup>17</sup> we find a vendor, on the refusal of the vendee to take, though no re-sale has been made to third parties, suing for damages merely, and the fact that the last English text-book on damages, Mayne,<sup>18</sup> asserts that the vendor can only recover damages, would seem to indicate that the rule laid down by Baron Parke is now settled law in England. In this country there is, as we shall see considerable conflict on the question between different jurisdictions.

The first case in America to raise the question of the right of the vendor to obtain specific performance is probably the Pennsylvania case of *Huber v. Burke*.<sup>19</sup> This was

<sup>12</sup> 3 East. 410, 1803.

<sup>13</sup> In *Martin v. Smith*, 6 East. 555, 1805, another case before Lord Ellenborough, the vendor, on the refusal of the vendee to take, sued for the full purchase price. The defendant raised the objection that the plaintiff had not sufficiently alleged his title. The case is decided on the pleadings, no objection being made to the suit for the full purchase price. Chitty in his work on Pleading recognizes the practice by inserting a special count for such a claim. See Chitty on Pleading, p. 292, Vol. 2, 5 Amer. ed.

<sup>14</sup> 7 M. & W. 474, 1841.

<sup>15</sup> Page 478.

<sup>16</sup> It has, however, been raised in New Brunswick and decided in accordance with the rule laid down in *Laird v. Pim*. See *Pugsley v. Gillespie*, 14 N. B. Rep. 195, 1872, p. 197.

<sup>17</sup> L. R. 3 C. P. 553, 1868.

<sup>18</sup> See page 213, 6 ed.

<sup>19</sup> 11 S. & R. 238, 1824. There is also an early case decided by the

an action of debt brought by the vendor to recover the penalty in articles of agreement for the sale of land. Chief Justice Gibson points out that as in Pennsylvania equity was administered through the common law actions, the action of debt was in the state a substitute for a vendor's bill in equity; thus, impliedly, admitting that such a bill by a vendor is proper.<sup>20</sup> *Cook v. Grant*,<sup>21</sup> in which the opinion was likewise written by Gibson, is similar to *Huber v. Burke*. In this last case, however, the judge develops the idea that at common law the plaintiff could, in an action of debt, always recover the full purchase price. The origin of this idea, as seen in the note, is probably due to a misreading of certain passages in Sugden on Vendors.<sup>22</sup> Believing that the purchase money can be recovered at law, he naturally explains the jurisdiction of equity, not by the inadequacy of the legal remedy, but because "it was supposed that justice required the remedies between the parties to be mutual."<sup>23</sup> Thus, in Pennsylvania the habit of administering equity in common law actions did not, in the opinion of the man who

Supreme Court of the United States, in which the opinion is written by Chief Justice Marshall. Marshall contents himself with declaring that the right of the vendor is unquestioned: *Cathcart v. Robinson*, 30 U. S. 264, 1831.

<sup>20</sup> He then proceeded to discuss whether, in the case before him, he must regard the action as a bill in equity. If he must, the instruction of the trial judge, that the plaintiff should show himself entitled to all the purchase money or recover nothing, was correct. Deciding that an action for the penalty in the articles of agreement was not an action for the purchase money, he held that the action was in effect not a bill in equity, and therefore that the instruction of the trial judge was erroneous.

<sup>21</sup> 16 S. & R. 198, 1827.

<sup>22</sup> Judge Gibson's statement is: "It was formerly thought that as the vendor wants nothing but the purchase money, which may be recovered in an action of debt, . . . etc." See page 209. By debt he doubtless means *indebitatus assumpsit*. The authority given by Gibson is Sugden on Vendors, page 164, 2 Amer. ed. 1820. Sugden, after stating that a vendor can have specific performance, says: . . . "although it appears to have been formerly thought that as a vendor only wants the purchase money, his remedy was at law." This is not a direct statement that at law the full purchase price could be recovered. There is indeed no conclusive evidence of Sugden's opinion on that point.

<sup>23</sup> Page 209.

then dominated the Supreme Court, give the vendor his action for the full purchase price; that existed before. What it did do was to require the parties to such an action to discuss their respective rights as if the plaintiff had brought a bill in equity, not an action at common law.<sup>24</sup> In *Wilson v. Clark*,<sup>25</sup> Judge Gibson followed the earlier cases by assuming that the plaintiff vendor could, under ordinary circumstances, recover the full purchase price, but that the defences which could be raised to a bill in England for specific performance could also be raised in the common law action in Pennsylvania. Finding in the case before him a lack of mutuality in the remedy, he permitted the plaintiff to recover damages, but not the purchase price.<sup>26</sup> It will be noted that the result of administering equity under common law forms

<sup>24</sup> Judge Gibson says: "But, in an action on the contract, even the English courts take cognizance of equitable objections, and, in Pennsylvania, where we have no separate court to control the exercise of legal rights, there is still greater reason for doing so." Page 209. Judgment for the plaintiff was reversed because of these "equitable objections" arising from the facts.

He refers, as authority for the above quoted assertion, to Sugden, page 178. The text of Sugden here supports his assertion as far as "cognizance of equitable objections" is concerned; but the cases referred to are actions by purchasers to recover deposits of purchase money, because of failure of title or other reason. See, for example, the cases cited. *Alpass v. Watkins*, 8 Term. 516, 1800; *Elliott v. Edwards*, 3 Bos. & Pull. 181, 1802; *Maberley v. Robins*, 5 Taun. 625, 1814. Sugden goes on to say that from these cases it may be inferred that in an action at law by the vendor for the non-performance of the agreement the court can take into account equitable considerations. But he nowhere makes the assertion that the purchase money can be recovered at law, either in the action of debt or any other action. For a similar positive inference that Sugden is an authority for the position that at law the purchaser could recover the full purchase price, see *Richards v. Edick*, 17 Barb. 260 N. Y. 1853, p. 265, per Gridley, J.

<sup>25</sup> 1 W. & S. 554, 1841.

<sup>26</sup> The lack of mutuality arose from the fact that the vendor had not signed the contract, as required by the Pennsylvania Statute of Frauds, before the vendor can be deprived of an interest in the land. The statute as interpreted by the courts permits the vendor or vendee of land to recover damages on a parol contract of sale. For a full discussion of the local Statute of Frauds, the case in question, and the identical case of *Measen v. Kaine*, 63 Pa. 335, 1869, see Fifth Paper, October number, 1901, pp. 573, 445.

is, in these instances, to prevent a plaintiff from recovering at law the full purchase price in a case where, if it had not been for the admission of equitable principles, the full purchase price could have been recovered. In *Tripp v. Bishop*,<sup>27</sup> the court followed their long-expressed opinion, and allowed a vendor to recover the full purchase price in an action of assumpsit which the court treated as a bill in equity.

In New York, as in the early cases in Pennsylvania, it was admitted that, as the vendor can recover at law the full purchase price,<sup>28</sup> the remedy at law was adequate, and again the necessity for mutuality is given as the sole ground for permitting him to bring a bill in equity against the vendee.<sup>29</sup>

Similar to this position of the early Pennsylvania and New York courts is that taken by Judge Caldwell in the Circuit Courts of Appeals for the Eighth Circuit, in confirming a

<sup>27</sup> 56 Pa. 424, 1867.

<sup>28</sup> In *Green v. Reynolds*, 22 Johns. cases 207 N. Y., 1808, a vendor of land sued the vendee at law for the full purchase price. He did not declare that he had tendered a deed, and judgment was given for the defendant. Like the English cases of the same period, see notes 11 to 13, *supra*, it is assumed that it is proper to sue for the purchase price. A similar assumption is made in *Jones v. Gardner*, 10 Johns. 266, 1813. There the plaintiff failed to recover the contract price only because he failed to show that he had offered a proper deed. See also *Parker v. Parmele*, 20 Johns. 130 N. Y., 1822, and *Johnson v. Wygant*, 11 Wend. 48 N. Y., 1833. In *Franchot v. Leach*, 5 Cow. 506 N. Y., 1826, where the defendant vendee was to pay \$100 down and \$200 on bond and mortgage, the plaintiff recovered \$300. There is no discussion of the question. The point, however, was raised and discussed in *Richards v. Edick*, 17 Barb. 260 N. Y., 1853, pp. 264 and 265. The court there regards *Laird v. Pim*, 7 M. & W. 474, 1841, see note 14, *supra*, as expressing the proper rule, but they regard themselves as bound by the long-settled practice of the state. The case of *Williams v. Field* referred to in *Richards v. Edick*, as containing a full discussion of this subject, does not seem to be reported on this point. It is probably the case reported on another question in 1 How. N. Y. Pr. 214, 1845.

<sup>29</sup> The court in *Brown v. Haff*, 5 Paige Ch. 235 N. Y., 1835, admitted the remedy at law to be adequate, but gave no reason in view of this fact for allowing the bill. In this case there was also equitable jurisdiction on the ground of discovery. In *Phillips v. Berger*, 8 Barb. 527 N. Y., 1850, aff. 2 Barb. Sup. Ct. 608, the court place the jurisdiction on the ground of mutuality. See also *Schroeppel v. Hopper*, 40 Barb. 425 N. Y., 1863.



decision of the Circuit Court of the United States for the district of Kansas. He assumes that the vendor could recover the purchase price at law and places the jurisdiction in equity on the rule of mutuality.<sup>30</sup> Mutuality is also given as the sole reason for permitting the vendor to bring his bill against the vendee by the courts of New Jersey,<sup>31</sup> North Carolina,<sup>32</sup> Georgia,<sup>33</sup> Arkansas,<sup>34</sup> and West Virginia.<sup>35</sup> The writer is not aware of any decision in these states determining the question whether at law the plaintiff could bring an action for the full purchase price. In one of them, North Carolina, the adoption of code procedure renders it less likely that the question of the original right of the plaintiff at law will be ever passed upon by the courts.<sup>36</sup>

In some jurisdictions, where the court has regarded the right of the vendor to recover the purchase money at law as unquestioned, they have not followed the general trend just indicated and supported the jurisdiction in equity on the ground of mutuality. An instance of the way in which a court may still regard the remedy at law as inadequate in spite of the fact that the price could be recovered at law, is *Gregorie v. Bulow*, decided by the Court of Appeals of South Carolina.<sup>37</sup> One of the reasons given for this opinion is that: "If the titles are not made within the exact time limited by the contract, or if to a small part of the land sold, of even inconsiderable value, the vendor has no title, and does not,

<sup>30</sup> *Raymond v. San Gabriel Val. Land & Water Co.*, 53 Fed. 883, 1893, p. 885.

<sup>31</sup> *Hopper v. Hopper*, 16 N. J. Eq. 147, 1863; *Semle, Rothholtz v. Schwartz*, 46 N. J. Eq. 477, 1890, which, however, as treated by the court, is not a case involving specific performance by vendor.

<sup>32</sup> *Sprigs v. Sanders*, Phill. Eq. 67 N. C., 1866.

<sup>33</sup> *Forsyth v. McCauley*, 48 Ga. 403, 1873; *Jackens v. Nicolson*, 70 Ga. 198, 1883.

<sup>34</sup> *Greenfield v. Carlton*, 30 Ark. 547, 1875.

<sup>35</sup> *Baumgardner v. Leavitt*, 13 S. E. 67 W. Va., 1891. In this suit jurisdiction was also taken to prevent multiplicity of suits at law, the legal title to the property sold having passed into the hands of third parties.

<sup>36</sup> For the effect of this code procedure on the questions discussed in this paper, see *infra*, note 78. See also for Arkansas Code Procedure, *ib.*

<sup>37</sup> Rich. Eq. Cas. 235 S. C., 1832, pp. 240, 241.

therefore, tender a conveyance for the whole, there can be no recovery at law."<sup>38</sup> Another reason given for the inadequacy of the legal remedy is the fact that if the vendee should happen to have judgments against him, the moment the vendor's titles are produced at the trial at law the vendee is entitled to receive them, "and the land becomes liable to all the previous liens to the entire destruction of the plaintiff's chance of payment."<sup>39</sup>

A conclusion directly opposite to that of the South Carolina court has apparently been reached in Maine. There, in the early case of *Alna v. Plummer*,<sup>40</sup> we have a direct decision that at law the vendor can recover the full purchase price. In *Porter v. Land and Water Company*,<sup>41</sup> the plaintiff vendor brought a bill in equity for the purchase price. The plaintiff did not, it seems, allege that his remedy at law was inadequate. The court in dismissing the bill take the position that the court does not take equitable jurisdiction in any case where there is a remedy at law.<sup>42</sup>

<sup>38</sup> Page 240. Illustrations of time being the essence of contracts to sell land at law are: *Wilde v. Fort*, 4 Taun. 334, 1812, and *Noble v. Edwards*, L. R. 5 Ch. Div. 378, 1877. In the later case the action was brought before the provisions of the Judicature Act (see Article 25, Sub. s. 7), which declared that time shall not be presumed to be the essence of a contract, went into effect: See page 392.

<sup>39</sup> Page 240. In the recent case of *Hammond v. Foreman*, 26 S. E. 212 S. C., 1897, the Supreme Court, while expressly reaffirming *Gregorie v. Bulow*, adopt what they believe to be the idea of Mr. Pomeroy in his work on Equity Jurisprudence, section 139; namely, that the jurisdiction over specific performance being exclusive, one does not have to show the inadequacy of the legal remedy.

<sup>40</sup> 4 Me. 258, 1826. The case of *Robinson v. Heard*, 15 Me. 296, 1839, is not *contra*, but in accord with the earlier case. The plaintiff in the last case had not offered a deed at time of trial. The court held that this prevented him from recovering the full purchase price, but say that had the plaintiff presented a deed, ". . . perhaps the rule of damages prescribed by the judge (this rule was the full purchase price) would appear to us to be correct. It would hold the defendant to pay what he agreed. The plaintiff did not stipulate to receive any part of that sum in land." Page 302.

<sup>41</sup> 84 Me. 195, 1892.

<sup>42</sup> It should be noted that the case may be regarded as one which merely enforces a rule of practice that a bill in equity, which is brought for an obligation for which there is an action at common law, must allege

So far we have dealt with jurisdictions in which the power of the courts to give specific performance is not limited by statute,<sup>43</sup> and in which the vendor could recover the purchase price at law. In all but the last instance mentioned the vendor, nevertheless, can proceed against the vendee in equity.

There are other jurisdictions where the power of the court of equity is unrestricted by statute, which have adopted the present English rule, that at common law the vendor can recover only the difference between the market and the contract price. This seems to be true of Vermont,<sup>44</sup> New Hampshire,<sup>45</sup> and Oregon.<sup>46</sup> In the first-mentioned state, I am not aware that the question of the vendor's right to specific performance in equity has arisen. In Oregon in the case referred to, *Johnson v. Wadsworth*, specific performance was granted the vendor on the ground both of mutuality and of the inadequacy of the common law remedy.<sup>47</sup> They also refer with approval to an idea suggested by Mr. Pomeroy;<sup>48</sup> namely, that the decree is not purely one for the payment of money, as it may compel the vendee to accept a deed. It may be suggested that the decree need not compel the defendant to accept a deed, and such acceptance by the defend-

that the remedy at law is inadequate, and not merely set forth facts from which the court can draw that inference. The court nowhere say the full purchase price can be recovered at law, neither do court or counsel refer to *Alna v. Plummer*, *supra*, note 40. On the other hand, both the counsel for the plaintiff and the counsel for the defendant, admit that at law there is an action for the purchase price. See page 197.

<sup>43</sup> In all the states referred to, the equitable jurisdiction of the state owes its origin to the constitution or to legislative enactments, but the jurisdiction is not especially restricted.

<sup>44</sup> See *Sawyer v. McIntyre*, 18 Vt. 27, 1843, p. 31. The case was that B. sold stoves to A., agreeing to take back all stoves unsold by A. at end of the year at a certain price. B. would not take back the unsold stoves. A. sued B. and recovered the full price agreed upon, on the theory that on notice by A. to B. to take back the stoves the property in the stoves revested in B.

<sup>45</sup> *Griswold v. Sabin*, 51 N. H. 167, 1871, pp. 170, 171; *Woodbury v. Jones*, 44 N. H. 206, 1862, p. 209.

<sup>46</sup> *Johnston v. Wadsworth*, 34 P. 13 Ore., 1893, pp. 13-15.

<sup>47</sup> Pages 13-14.

<sup>48</sup> Pom. Spe. Per., § 6, 2 ed. 1897.

ant is a mere result of the real object of the decree, which is to compel the defendant to pay a sum of money.<sup>49</sup> In New Hampshire, in the case of *Eckstein v. Downing*,<sup>50</sup> the court take two positions; the first being that though equity is part of the common law of New Hampshire,<sup>51</sup> if the damages which may be recovered at law are adequate, the courts will not necessarily follow the English cases, and grant specific performance on the ground of mutuality. Secondly, in the case before them, where the plaintiff had agreed to sell his yacht to the defendant for certain stocks and bonds; that the sale did not differ from a sale for money; that the plaintiff was not injured by the breach, and if he was; that "it was not found as a fact, nor can it be inferred as a matter of law from the facts, that the plaintiff's remedy at law is not convenient and complete."<sup>52</sup> The case, however, does not go so far as to say that the vendor could not have specific performance if he could allege and prove that damages would be inadequate compensation.<sup>53</sup> The point seems to be that the court feels that damages at law must be presumed to be adequate, even though the purchase price is not recovered, unless the court has evidence to the contrary. The evidence wanted is not made clear by the opinion. The case is interesting as it is the only one which seems to doubt the assumption that the remedy at law is incomplete when only the difference between the contract price and the so-called market price can be recovered.<sup>54</sup>

The cases so far reviewed are all that I have been able to find which discuss the rights of the vendor to the purchase money either at law or in equity, except cases in those states where the jurisdiction of the courts of equity over specific performance is expressly limited by statute to instances in which there is not an adequate remedy at law. We shall now turn to the cases in this second class of states; and first to those in Pennsylvania.

<sup>49</sup> An Oregon trial court gave specific performance to a vendor in the earlier case of *Sandford v. Wheelan*, 12 Ore. 301, 301, 1885; the case was reversed on other grounds.

<sup>50</sup> 64 N. H. 248, 1886.

<sup>51</sup> See *Ib.*, page 259 and cases cited.

<sup>52</sup> *Ib.*, page 260.

<sup>53</sup> *Ib.*, page 258.

<sup>54</sup> See *infra*, note 90, for a discussion of this question.

We have seen that during the early part of the nineteenth century equity was administered in Pennsylvania through the common law actions, and that Judge Gibson allowed the vendor to bring an action of debt for the full purchase price; and though he believed the action could have been brought at law in England, and supposedly also in Pennsylvania, he treated the action as a bill in equity.<sup>55</sup> In 1836, the legislature conferred upon the courts of common pleas of Philadelphia County jurisdiction in equity in certain classes of cases, among others: "Affording specific relief when a recovery in damages would be an inadequate remedy."<sup>56</sup> This statute was extended to all the common pleas courts of the State in 1854.<sup>57</sup> In *Dalzell v. Crawford*,<sup>58</sup> the court held that, under the facts of the case, the vendor could maintain a bill for specific performance. The facts referred to where the obligation of the vendee to pay part of the purchase money in cash, giving a bond and mortgage for the residue. Under such circumstances, the remedy at common law was considered inadequate, but the court refuse to decide the question of the ability of the vendor, who sought only by the payment of money, to obtain relief in equity. In *Tiernan v. Roland*,<sup>59</sup> the Supreme Court of the State grants specific performance to a vendor; but here again the obligation of the vendee was to give a bond and mortgage as well as pay money. At this time the Supreme Court would have probably allowed the vendor to recover in equity the purchase price, though the payment of a sum certain at a definite time was the only obligation of the vendee. This is shown by the assumption in the case of *Bodine v. Glading*,<sup>60</sup> that the vendor in that case, who merely wanted money, would have succeeded if the contract had been mutual. The right of the vendor is indeed positively asserted in *Finley v. Aiken*,<sup>61</sup> though as in *Bodine v. Glad-*

<sup>55</sup> See note 19.

<sup>56</sup> P. and L. Dig. of Pa. Laws, Col. 710.

<sup>57</sup> P. and L. Dig. of Pa. Laws, Col. 713.

<sup>58</sup> 1 Pars. Eq. 37, 1842: In the Courts of Common Pleas of Philadelphia County.

<sup>59</sup> 15 Pa. 429, 1850.

<sup>60</sup> 21 Pa. 50, 1853.

<sup>61</sup> 1 Grant. 83, 1854.

ing the bill is dismissed on other grounds, and, unlike *Bodine v. Glading*, the vendee was to give a bond and mortgage.<sup>62</sup> But in *Kauffman's App.*,<sup>63</sup> where the vendee had only to pay money, the bill of the vendor was dismissed, on the ground that the remedy at law, being identical, the express words of the statute prevented the court from adopting the English practice. *Tiernan v. Roland* is referred to as a case where the plaintiff was entitled to a bond and mortgage as well as money, and, therefore, in that case the remedy at common law was not complete. *Kauffman's Appeal* has been followed in several later instances;<sup>64</sup> in none of these, however, has the question of the right of the vendor been discussed when the agreement of the vendee is to give a bond and mortgage. Indeed, this distinction between the completeness of the remedy at common law, in the event that the vendee is obliged to pay all the purchase price in cash, and where he can allow part to remain on mortgage, may be questioned. The right to give a bond

<sup>62</sup> Judge Lowrie, who wrote the opinion of the majority, seems to have been under the impression that the question before the court was, whether the existence before the passage of the statute granting equity jurisdiction of the practice of granting equitable relief under common law forms, prevented the courts from entertaining bills in equity in cases where, owing to the peculiar practice referred to, equitable relief could be obtained in a common law action? This question he answers in favor of the equitable jurisdiction. As a general assertion the learned judge is borne out by the cases. The statute, as we have seen in the case of vendors, *supra*, page —, note 27, did not take from litigants any right to seek in common law actions such equitable relief as they would have had, had the statute not been passed. On the other hand the practice of administering equity in common law actions does not prevent the bringing of a bill in equity under the equitable jurisdiction conferred by the statute. But while this may be generally true it is not true of the jurisdiction over specific performance, which is especially limited by the statute to cases where the remedy at law is inadequate. Judges Black and Knox dissented. They would have denied a bill in equity to a vendor irrespective of the fact whether the vendee was to pay money or to pay money and give a bond and mortgage. All the members of the court united in dismissing the bill on the ground of the misrepresentations of the plaintiff.

<sup>63</sup> 55 Pa. 383, 1867.

<sup>64</sup> *Dech's App.*, 57 Pa. 467, 1868; *Smaltz's App.*, 99 Pa. 310, 1882; *Semble Weaver v. Shenk*, 154 Pa. 206, 1893.

and mortgage for part of the purchase price is a privilege of the vendee, not a right of the vendor. The court decreeing specific performance against the vendee who has the privilege of giving a bond and mortgage will always allow him to pay the full purchase price in cash.<sup>64a</sup> Indeed if they did not allow this they would be enforcing a contract to borrow money, which a court of equity will not do.<sup>64b</sup> Again, suppose a jurisdiction like Pennsylvania, where the vendor can recover the full purchase price at law. In such a jurisdiction what are the rights at law of the vendor where the vendee is entitled to give a bond and mortgage in lieu of part of the purchase price? The only case found answering this question is *Franchet v. Leach*.<sup>65</sup> There the vendee recovered the full purchase price at law, though under the contract the vendee had the privilege of giving a bond and mortgage for part of the price. If this case is to be followed the remedy at law is more than adequate where the vendee is to give a bond and mortgage.

There is one case, however, in which the distinction adopted by the Pennsylvania courts has more justification. Besides contracts in which the vendee agrees to pay the full price in cash at one time, and contracts in which the vendee agrees to pay part in cash and give a bond and mortgage for the residue, there are contracts in which the vendee may agree to pay in installments, the conveyance to be made on the payment of the last installment. In this case in all jurisdictions where the vendor could recover the full price where the payment was to be made on a day certain, there would appear to be no reason why the vendor could not recover at law each installment as it fell due. Where, however, the vendee agrees to pay in installments, the vendor to convey on the payment of the first installment, the vendee to give a bond and mortgage to secure the remaining payments, then the rights of the vendor at law in the jurisdictions mentioned become more complicated. Having offered to convey as each installment became due he would appear to have a right, on the falling due of the last installment,

<sup>64a</sup> See for example *Schroeppel v. Hopper*, 40 Barb. 425 N. Y., 1863.

<sup>64b</sup> See *Rogers v. Challis*, 27 Beav. 175, 1859.

<sup>65</sup> 5 Cow. 506 N. Y., 1826.

to sue for the full purchase price.<sup>65a</sup> If he sued for the first installment he would have to offer a deed, and except possibly in Pennsylvania, there is no way for the common law court to make the acceptance of the deed by the vendee dependent on executing the bond and mortgage. In this instance, therefore, there would appear to be some justification for the distinction raised in *Kauffman's Appeal*, between the vendor, who was entitled to the whole purchase price, and one whose vendee was entitled to give a bond and mortgage; but it is doubtful whether the distinction is justified in Pennsylvania.

The equitable jurisdiction over specific performance in Massachusetts is also confined by statute to cases: "when the parties have not a plain, adequate and complete remedy at the common law."<sup>66</sup> In two cases, occurring about the middle of the last century, *Gill v. Bicknell*,<sup>67</sup> and *Jacobs v. Peterborough and Shirley Railroad Company*,<sup>68</sup> the Supreme Court of the state express the opinion, that as a vendor could recover the purchase price at law, he should not be permitted to bring a bill in equity. Both bills in the cases mentioned were also dismissed on other grounds. In the case of the *Old Colony Railroad Company v. Evans*,<sup>69</sup> these opinions were reversed. It was held that at law the vendor could only recover the difference in value between the contract and the market price. The remedy at law being considered inadequate, the vendor's bill was allowed. It is probable that this case is still law, and that in the state a bill in equity is the proper remedy for both parties in all contracts of sale, where the subject matter of the sale is real property or personal property not duplicable on the market. The equitable jurisdiction in this case is based on the assumption that the full purchase price could not be obtained at law. There seems to be, however, one instance in which the courts of the state have allowed the vendee to recover at law the full purchase price. This is illustrated by the case of *Thorndike*

<sup>65a</sup> See *Jones v. Newhall*, 115 Mass. 244, 1874, p. 250.

<sup>66</sup> Gen. Sts., c. 113, § 2.

<sup>67</sup> 2 Cush. 355, Mass., 1848, p. 358.

<sup>68</sup> 8 Cush. 223 Mass., 1851, p. 225.

<sup>69</sup> 6 Gray, 25 Mass., 1856.



v. *Locke*.<sup>70</sup> The case was, that B. sold stock to A. ; B. agreeing to take back the stock, at a stipulated price which A. had not resold by a specified time. In allowing A. to recover this price the court said : "The plaintiff had parted with his money on the faith of the defendant's agreement to repay it at the expiration of the year." This is apparently proceeding on the principle that the vendor can recover the full purchase price at law if he has spent money under the prior provisions of the contract, and it follows from this decision that in a case so circumstanced the plaintiff could not recover in equity ; indeed the Supreme Court of the state did in such a case dismiss the vendor's bill.<sup>71</sup> The principle of *Thorn-dike v. Locke* also explains the refusal of the court to take jurisdiction of the vendor's bill in *Jones v. Newhall*.<sup>72</sup> There the defendant had agreed to buy from the plaintiff his interest in two land companies and a certain promissory note. The purchase price for the whole was to be paid in installments, and on the payment of certain of the installments a certain part of the shares of the land companies was to be transferred. After the plaintiff had received payment for and transferred his interest in one of the land companies the defendant refused to go on with the contract. The court regarded the agreement to sell the interests in both land companies as an entire contract. The plaintiff had, therefore, parted with his property on the faith of the contract, and the court declares the remedy at law to be adequate, the plaintiff having his option of waiting until all installments fell due and bringing one suit for the entire purchase price, or suing for each installment as it fell due.<sup>73</sup>

In Connecticut there was a general statute providing that courts of equity shall take cognizance only of matters in which relief cannot be had at common law.<sup>74</sup> There is apparently some doubt as to whether this statute is not repealed.<sup>75</sup> In any event the court's attitude toward the

<sup>70</sup> 98 Mass. 340, 1867.

<sup>71</sup> *Noyes v. Marsh*, 123 Mass. 286, 1877.

<sup>72</sup> 115 Mass. 244, 1874.

<sup>73</sup> See *id.*, page 250.

<sup>74</sup> Rev. Stats., 1875, p. 413, sec. 5.

<sup>75</sup> See *Hodges v. Kowing*, 58 Conn. 12, 1889, p. 21.

statute was that it was merely declaratory of a general principle of chancery jurisdiction.<sup>76</sup> This interpretation of such a statute would be important in a jurisdiction where the court thought that the vendor could recover the full purchase price at law. In such a jurisdiction the opinion that the statute was merely declaratory of the common law would enable a plaintiff vendor to bring a bill in equity on the ground of mutuality. In Connecticut it has no practical effect on the question under discussion, as it is the opinion of the court, expressed in the same case, that at law the plaintiff vendor would be restricted to damages.<sup>77</sup>

Thus in those states where the jurisdiction of equity over specific performance is limited by statute to cases in which the common law does not afford an adequate remedy, to ascertain whether a bill in equity may be brought by the vendor, it is first necessary to know whether in the jurisdiction the full purchase price can be obtained by the vendor at law. If the vendor cannot obtain at law the full purchase price than a bill in equity is a proper remedy. If the full purchase can be obtained by the vendor at law then the tendency is to deny the right to proceed in equity. This tendency is, however, not universal. In a jurisdiction where the case has not been decided it is possible that the courts will uphold the equitable jurisdiction on the ground of mutuality, and because the statute, though apparently limiting the jurisdiction to cases where the common law is deficient is regarded as merely expressing an accepted principle of equity jurisdiction, and not as limiting that jurisdiction.

It remains to discuss the effect of the reformed American or Code Procedure, adopted in a number of the states. It will have been noticed that the two classes of questions which arise when a vendor seeks to obtain the full contract price are, First: Does the law allow such a recovery?

<sup>76</sup> *Munson v. Munson*, 30 Conn. 425, 1862.

<sup>77</sup> *Hodges v. Knowling*, 58 Conn. 12, 1889, p. 21. See also *Andrew v. Babcock*, 26 Atl. 715, Conn., 1893. Connecticut has, and had at the time of this decision, one action for the enforcement of equitable and legal remedies. The complaint in the case was brought and tried on the theory of a bill in equity, and had to be sustained as such. See *infra*.

Second: The proper proceedings to bring. In some jurisdictions the forms of actions at law and the bill in equity are expressly abolished,<sup>78</sup> in others the same result is reached by providing that hereafter in the jurisdiction there shall be but one form of action for the enforcement and protection of private rights.<sup>79</sup> The Arkansas Code, though as stated in the note, providing that there shall be but one form of civil action, declares that the proceedings in a civil action may be of two kinds, legal or equitable.<sup>80</sup> So in Iowa, though all forms of action are abolished, proceedings in civil actions may be of two kinds, ordinary and equitable.<sup>81</sup> It would appear, therefore, that in these states the code has in no wise affected the possibility of the two classes of questions just referred to arising. As, therefore, in Iowa, before the present code it was proper for the purchaser to sue for the full purchase price at law,<sup>82</sup> it may be supposed that it is not proper to sue the vendor for the full purchase price in an equitable action except the equitable action was maintained on the ground of mutu-

<sup>78</sup> This is done expressly in the following states: Arkansas, see Dig. Stats., 1894, § 5604; Indiana, see Stats., 1896, § 249; Iowa, see Anno. Code, 1897, tit. xviii, part iii, Code Civil Prac., chap. I, § 3426; Kansas, see Gen. Stats., 1901, chap. lxxx, § 4438; Minnesota, see Stats., 1894, chap. lxvi, tit. I, § 5131; Nebraska, see Comp. Stats., § 5592, 1897, Code of Civ. Pro., § 2; New York, see Chas. Pocket Code Civ. Pro., 1901, § 3339, Code Civ. Pro., § 69; North Carolina, see Battle's Revisal, 1873, Code Civ. Pro., tit. iii, § 12; North Dakota, see Rev. Codes, 1899, § 5181, Code of Civ. Pro., §§ 33 and 34; South Dakota, see Grantham's Anno. Stats., 1901, § 6030; Wyoming, see Rev. Stats., 1899, § 3443.

<sup>79</sup> California, see Code Civ. Pro., 1897, part ii, tit. i, § 307; Connecticut, see Gen. Stats., 1888, chap. lxxix, tit. xviii, § 87; Missouri, see Rev. Stats., 1899, chap. viii, art. i, § 539; Montana, see Codes Anno., 1895; Code Civ. Pro., part ii, tit. i, § 460; Nevada, see Cutting's Comp. Laws, 1900, § 3096, Code Civ. Prac., tit. i, § i; Ohio, see Bate's Anno. Stats., 1897, § 4971; South Carolina, see Rev. Stats., 1893, vol. 2, Code Civ. Pro., part ii, tit. i, § 89; Texas, see Rev. Stats., 1895, arts. 1177-1190; Washington, see Ballinger's Anno. Code and Stats., 1897, § 4793.

<sup>80</sup> Dig. Stats., 1894, § 5607. Compare *ib.*, §§ 4918 and 4919.

<sup>81</sup> Anno. Code, 1897, tit. xviii, part iii; Code Civ. Pro., chap. i, § 3426.

<sup>82</sup> *Goodfoster v. Porter*, 11 Iowa, 161, 1860, p. 164. The present code was adopted in 1873.

ality.<sup>83</sup> In the other states mentioned the style of the action and the pleadings are the same, whether the relief sought falls under the equitable or legal jurisdiction of the court. When the character of trial for the issue is to be determined the question of the origin of the relief sought may become important. Thus, in Connecticut it is expressly provided that where the action under the old practice would not present a question properly cognizable in equity, either party has a right to trial by jury.<sup>84</sup> In this state, therefore, if the plaintiff vendor or the defendant vendee should demand a jury trial, the question of the relief originally granted to the vendor at common law, and the effect of such relief on the equitable jurisdiction of the court, would have to be decided.

Many of the codes provide, that issues of fact for the recovery of specific real or personal property or for money must be tried by jury, unless a jury trial is waived.<sup>85</sup> In these states it would at first appear that whether the vendor sought his purchase money under the common law or equitable jurisdiction of the court, the issue of fact in the case must go to the jury, and, provided the court thought

<sup>83</sup> It should, however, be noted that the case cited was one in which the plaintiff in fulfilling the prior provisions of the contract had expended money; see, for cases basing a distinction on this point, *supra*, note 70.

<sup>84</sup> Connecticut, see Gen. Stats., 1888, chap. lxxiv, tit. xviii, § 1030.

<sup>85</sup> California, see Code of Civ. Pro., 1897, part ii, tit. viii, chap. iii, § 592; Kansas, see Gen. Stats., 1897, see Code of Civ. Pro., § 276; Minnesota, see Stats., 1894, chap. lxvi, § 5360; Missouri, see Rev. Stats., 1899, chap. viii, art. vii, § 691; Montana, see Codes Anno., 1895, Code Civ. Pro., part ii, tit. viii, chap. iii, § 1034; Nebraska, see Comp. Stats., 1897, § 5851, Code Civ. Pro., chap. ii, § 280; North Carolina, see Battle's Rev., 1873, chap. xvii, Code Civ. Pro., tit. x, chap. ii, § 224; North Dakota, see Rev. Codes, 1899, chap. x, art. ii, § 5420, Code Civ. Pro., § 236; Ohio, see Stats., 1897, § 5130; South Carolina, Rev. Stats., 1893, vol. ii, Code Civ. Pro., part ii, tit. viii, chap. ii, § 274; South Dakota, Grantham's Anno. Stat., 1901, § 6239; Washington, see Ballinger's Anno. Code and Stats., 1897, § 4967; Wyoming, see Rev. Stats., 1899, § 3659. In New York it is provided that an issue of fact in which the complainant demands a sum of money only must be tried by jury unless a jury trial is waived or a defence made; Chase's Pocket Code Civ. Pro., 1901, § 968. The reference referred to cannot be had without the consent of both parties, except in cases requiring the examination of accounts, *ib.*, § 1013.

he could recover under either jurisdiction, it would be unnecessary to determine which in order to decide any question of procedure. There would seem, however, to be a considerable conflict of opinion in regard to the proper interpretation of this provision,<sup>86</sup> and, though I know of no case discussing the point, it would appear to be doubtful, whether, if the court in any of the jurisdictions having this provision, thought that their right to give the vendor the purchase money was derived from their equitable jurisdiction, they would not have the right to refuse a jury trial. In three states, Indiana, Nevada, and Texas, all civil actions are triable by jury, unless a jury trial is waived by the parties.<sup>87</sup> In these states, in suits by purchasers for the full purchase money, the only question which could arise would be whether, under either the equity or common law jurisdiction of the court, the plaintiff could maintain his suit. The opinion that it was a suit properly falling, on the one hand under equity, or, on the other hand, under the common law, would in no wise affect the pleadings or the mode of trial.<sup>88</sup>

Under the old practice, where the vendor is permitted to recover the full purchase price at law, it is probably necessary for him to produce the deed at the trial. In equity the defendant will not be made to pay the full purchase price unless the plaintiff shows himself able to make a good title. Following this general idea, the court of Nebraska, working under a code, said that a plaintiff vendor who wanted the full purchase price must offer a deed or produce it at a trial,

<sup>86</sup> Compare *Woodman v. Davis*, 32 Kan. 344, 1884, page 347; *Berkey v. Judd*, 14 Minn. 394, 1869; *Brundridge v. Goodlove*, 30 O. S. 374, 1876.

<sup>87</sup> Indiana, see Horner's Anno. Stats., 1896, § 516; Nevada, see Cutting's Comp. Laws, 1900, § 3252, Code Civ. Prac., chap. iii, § 157 (a reference can be had in the cases involving the investigation of accounts, see *ib.* and § 328); Texas, see Rev. Stats., 1895, arts. 1177-1190, compare *ib.*, art. 1335.

<sup>88</sup> The doubt expressed by the Supreme Court of Indiana, in the case of *Porter v. Travis*, 40 Ind. 556, 1872, as to whether at law a purchaser could or could not recover the full purchase price, need therefore never be resolved, as the court in the case referred assume that either in law, or, if not in law in equity, the purchaser can recover the full purchase price. See pp. 559-561. The code procedure was adopted in 1881.

but that he who sued only for damages need not do so.<sup>89</sup> It may be presumed that this rule would be followed in other states practicing under a code.

Whether the latter should recover at law the full purchase price, or, or if he can recover at law, whether he should also recover in equity is a matter of importance only from the point of view of procedure. It would perhaps lead us too far afield to discuss the policy of allowing the vendor, whether at law or in equity, to recover from the vendee the sum which the latter was under obligation to pay. It has always seemed to the writer that the burden of proof should in every case be thrown on a defendant who would deny to the plaintiff the right to have an exact fulfilment of the contract; that something could be said in favor of preventing a suit for damages on a broken contract where a decree for specific performance could be obtained, but that the presumption should always be in favor of one who asked nothing but that which the defendant had agreed to give. Be that as it may, the important point to see in connection with the rights of the vendor of real property is that the same reasoning which would deny in such a case the payment of the full purchase price to the vendor would deny the land to the vendee. Specific performance is given to the vendee, not because large damages would not be an adequate compensation, but because it is impossible to duplicate a particular lot of land. Being impossible to duplicate, its value is a matter of inference and opinion. It is impossible accurately to measure in money the loss to him who fails to obtain the land for which he bargained. This is not because the vendee may be peculiarly affected by the beauty or the adaptability to his purposes of the land in question. Courts cannot take into account the individual tastes and character-

<sup>89</sup> *Wasson v. Palmer*, 17 Neb. 330, 1885, p. 332. For this opinion they cite *Laird v. Pim*, see *supra*, note 14, which would seem to indicate that they derived their right to grant the vendor the full purchase price solely from their equitable jurisdiction. But Sedgwick's use of the case as a positive authority for the proposition that at law only damages to the extent of the difference in value between the contract and the market price can be recovered by the vendor is hardly justifiable. See Sedgwick on Damages, p. 214, 8 ed., 1891.

istics of their suitors. It is because it is impossible for a jury to estimate the money loss, the loss to the average man in the plaintiff's situation, that specific performance is given to the vendee. In this respect the vendor, where the breach is committed by the vendee, is in exactly the same situation. One piece of money is as good to him as another. But whereas he was to have the purchase price, he has the land, the value of which is only a matter of opinion. His loss is conjectural, and damages based on an attempted estimate are just as inadequate a remedy as in the case of the vendor. In both cases at law the plaintiff recovers a sum of money said to be the difference between the contract and the market price. The vice of this is the assumption that in the case of land there is a market price in the sense that there is a market price for stock listed on the exchange, or corn, or hogs. The conception "market price," when applied to these last, involves both the ability to duplicate the commodity, and an efficient demand—that is, a sufficient number of persons willing to buy at the price to take any reasonable amount offered. Neither of these facts is present in regard to any piece of land. It is true that the vendor, where the vendee has committed the breach, can sell the land under the hammer, and sue the vendee for the difference between the price obtained and the contract price. But in so doing he would lose his vendor's lien for the unpaid purchase money, the amount he sued for being in the case supposed practically unpaid purchase money. Again, is a vendor safe in allowing a sale of the land to take place unless a fair price is bid? If real estate experts testified that the land was sacrificed, the right of the vendor to recover the difference between the price he had received, and the price the vendor agreed to pay, may be questioned.<sup>90</sup> Thus the arguments which support specific performance of contracts for the sale of land at the instance of the vendee, support the vendor in his demand for the full purchase price.

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<sup>90</sup> The burden of proving in such a case that the sale was properly conducted would be on the vendor: *Weast v. Derrick*, 100 Pa. 509, 1882. The price received at a resale is strong, but it would not be proper to say in all jurisdictions conclusive, evidence of value: *Gardner v. Armstrong*, 31 Mo. 535, 1862, pp. 540, 541.